



October 24, 2001

Ms. Angela K. Washington
Cowles & Washington
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2001-4837

Dear Ms. Washington:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153852.

The Town of Addison (the "town") received a request for copies of airport activity reports, marketing reports, rent rolls, and management reports related to the town's airport for the months of January through July of 2001, inclusive. In addition, the requestor seeks electronic copies of all lease forms used for airport property since January 1, 2001 to date, all rental agreement forms used since January 1, 2001, all correspondence from the town and the Airport Operator to Orbitus, Inc., all airport property value assessment and appraisal reports made since January 1, 2001, and the results of all land use studies since January 1, 2001. You state that some of the information requested has previously been provided to the requestor, but claim that certain airport property value assessment and appraisal reports are excepted from disclosure under sections 552.104 and 552.105 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. *See Gov't Code § 552.304.*

Initially, we note that the town does not claim that any of the requested information other than the airport property value assessment and appraisal reports is excepted from public disclosure, and in fact states that it has released some of the requested information. To the

extent the town has not already done so, it must release the remainder of the requested information immediately.¹ See Gov't Code §§ 552.006, .301(a), .302.

We next note that the submitted information is expressly made public under section 552.022 of the Government Code. Section 552.022 makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108" Gov't Code § 552.022(a)(1). We find that the information you have submitted is subject to section 552.022(a)(1). Therefore, as prescribed by section 552.022, this information must be released to the requestor unless it is confidential under other law.

¹Indeed, this office has issued two prior rulings to the town finding that much of the information covered by the instant request is not excepted from disclosure and must be released to this same requestor. See Open Records Letter Ruling Nos. 2001-3138 (2001) and 2001-3419 (2001). In Open Records Letter Ruling Nos. 2001-3419 (2001), we addressed the requestor's assertions concerning the release of information in electronic form by referring to section 552.228 of the Government Code which provides in part that

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

- (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

(c) If a governmental body is unable to comply with a request to produce a copy of information in a requested medium for any of the reasons described by this section, the governmental body shall provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. A governmental body is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies.

You argue that the requested information is excepted under sections 552.104 and 552.105. Section 552.105 is a discretionary exception designed to protect the interests of a governmental body, and therefore this provision is not "other law" for purposes of section 552.022. However, the 77th Legislature enacted Senate Bill 1458,² which amends section 552.104 by adding subsection (b) as follows:

The requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under [section 552.104].

Senate Bill 1458 became effective on June 15, 2001, and is therefore applicable to this ruling. We therefore address your section 552.104 arguments.

Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific statutory authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

In this case, you argue that

[t]he information requested relates to Airport property over which the City-owned Airport and third parties are currently in lease negotiations. One report concerns a tract that the City hopes to lease to a third party. The other

² Act of May 28, 2001, 77th Leg., R.S., S.B. 1458, § 7.01 (to be codified at Gov't Code § 552.104).

report concerns a tract for which the City hopes to purchase a leasehold interest. Municipalities are authorized to maintain and operate airports and to enter into contracts and leases regarding airport property by Chapter 22, Texas Transportation Code. There are several municipal airports in the area from which third parties could lease T-hangar space. The reports would provide such airports with information they would not normally have and could be used by them to undercut the City's negotiations for one of the tracts involved. With respect to the other tract involved, the reports would provide information to others desiring an airport leasehold that they would not normally have and could be used by them to undercut the City's negotiations with respect to the purchase of the leasehold.

On the basis of these arguments, we find that the town has demonstrated how release of the submitted information would harm its legitimate marketplace interests. Therefore, the submitted information is excepted from disclosure under section 552.104 and may be withheld from the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearl
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 153852

Enc. Submitted documents

c: Mr. Bob Huckabee
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(w/o enclosures)